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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Joseph Nemargut, Jr.
File: B-252674
Date: June 29, 1993

DIGEST

1. An employee was rated outstanding under the Performance Management Recognition System during 1991, but was not granted an annual performance award by his agency. He argues that, even though the law governing the award (5 U.S.C. § 5406) was amended to change the law from the mandatory "shall be paid" to the permissive "may be paid", since the regulations governing payment had not been formally changed to reflect the amendment, those regulations continued to control until officially changed. The claim is denied. The amendments made to section 5406 by Public Law 102-22 became effective on April 1, 1991. When a law is amended, any substantive part of an existing regulation implementing the replaced law which does not conform to the new law must be regarded as having been modified accordingly. 36 Comp. Gen. 40 (1956).

2. Public Law 102-22, amended 5 U.S.C. § 5406, effective April 1, 1991, to grant each agency discretionary authority to pay or not to pay a performance award. Absent a clear showing that an agency acted arbitrarily or capriciously in the exercise of that discretion, we will not substitute our judgment for that of the agency. Employee's claim for annual performance award for 1991 is denied.

DECISION

Mr. Joseph Nemargut, Jr., appeals our Claims Group's settlement, Z-2868182, Feb. 16, 1993, disallowing his claim for an annual performance award under the Performance Management Recognition System (PMRS). We sustain our Claims Group's disallowance for the following reasons.

Mr. Nemargut was employed by the Environmental Protection Agency (EPA) in Washington, D.C., prior to September 8, 1991. While so employed he was given an "Outstanding" rating when his annual performance appraisal was prepared in 1991.

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From September 8 to November 16, 1991, he was employed by the National Transportation Safety Board (NTSB). Because he was an employee of the NTSB when merit pay increases became payable, the NTSB awarded him a merit pay increase on October 6, 1991, based on the performance rating given by the EPA.

On November 17, 1991, he left his position with the NTSB and returned to the EPA to accept a position in North Carolina. In the belief that he was also entitled to a lump-sum performance-based award for fiscal year 1991, he filed a claim with the NTSB because it was his employer at the conclusion of fiscal year 1991. The NTSB denied his claim. On appeal, that action was sustained by our Claims Group because the law which authorized the payment was amended effective April 1, 1991, to make the payment discretionary by the agency, rather than mandatory.¹

Mr. Nemargut argues that, even though the law was amended and new regulations proposed, the governing regulations had not been formally changed. He contends that proposed regulations may not supersede existing regulations until they are actually adopted. He also argues that, although subsection 540.109(d)(1) of the draft regulations does contain the permissive language, subsection 540.109(d)(2) requires that employees with a higher level rating must be given a higher award amount than those with a lower rating. The only exception to this requirement is stated in subsection 540.109(f) which eliminates recently promoted employees from awards consideration.

The former provisions of 5 U.S.C. § 5406 (which were replaced by Public Law 102-22) provided in part in subsection (a)(1), that any covered employee whose performance is rated at the level 2 levels above the fully successful level "shall be paid a performance award" As amended, that provision now reads that any covered employee whose performance is rated at the fully successful level or higher "may be paid a performance award" Emphasis added. This statutory amendment became effective April 1, 1991.

The term "shall" generally is construed in the imperative or mandatory sense and the term "may" signifies discretionary or permissive authority.² Since the amendment made to 5 U.S.C. § 5406 by Public Law 102-22, supra, represents a fundamental departure from the mandatory language of the law

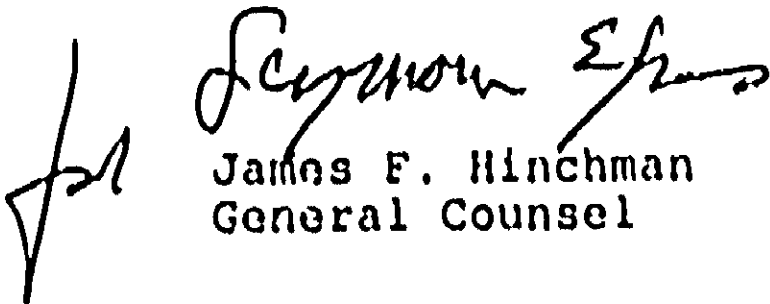
¹Pub. L. 102-22, Mar. 28, 1991, 105 Stat. 71.

²Antonio O. Lee, B-229447, Sept. 14, 1988; B-184515, Jan. 12, 1976, B-144985, Mar. 3, 1961. See also 10 U.S.C. § 101(28) and § 101(29) (1988).

which it replaced, any substantive part of the existing regulations implementing the replaced law which specifically used the mandatory term "shall", or was not otherwise in conformity with the amending statutory provisions must be regarded as having been modified accordingly.³

Because the regulations in effect prior to enactment of Public Law 102-22 no longer reflected the law, the Office of Personnel Management, by letter dated August 19, 1991, sent copies of proposed advisory regulations to the directors of personnel of each agency. This was done to inform them of the change in the law as well as their new discretionary authority under those changes and help establish uniform procedures among the agencies so that the law could be implemented by the agencies in a consistent manner. Those changes were issued as interim regulations on June 1, 1992, retroactive to April 1, 1991,⁴ and became final on December 22, 1992.⁵ In this regard, the particular language in subsection 540.109(d)(2) of the advisory regulation proposed by OPM referred to by Mr. Nemargut never became part of the interim regulations or the final regulations.

As the foregoing relates to the present situation, the NTSB had full discretionary authority under the law to grant or not to grant the claimant a lump-sum performance award. The NTSB chose not to grant him the award. In the absence of a clear showing that the agency acted arbitrarily or capriciously in the matter, we will not substitute our judgment for that of the agency. Accordingly, our Claims Group's action is sustained.


James F. Hinchman
General Counsel

³See 36 Comp. Gen. 40 (1956).

⁴57 Fed. Reg. 23043.

⁵57 Fed. Reg. 60715.